

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HDI-GERLING AMERICA INSURANCE  
COMPANY,

Plaintiff(s),

No. C 08-1716 PJH

v.

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTIONS TO DISMISS**

HOMESTEAD INSURANCE COMPANY,  
et al.,

Defendant(s).

Defendants' motions to dismiss were heard on July 9, 2008. Homestead Insurance Company ("Homestead") appeared by its counsel Howard Wollitz and Great American E&S Insurance Company ("Great American") appeared by its counsel Robert Fineman. Plaintiff HDI Gerling America Insurance Company ("Gerling") appeared by its counsel Richard Eggerth and Christine Fierro.

**BACKGROUND**

Gerling brought this action for declaratory relief and contribution against Homestead and Great American. The action arises out of two underlying construction defect cases against Jonce Thomas Construction Company ("Jonce"), *Emery Bay II Associates v. Devcon Construction Incorporated, et al.* ("Emery Bay") and *Chartwell HOA, et al. v. 44 Third Street, Ltd. LP, et al.* ("Chartwell"). Gerling issued a primary general liability insurance policy to Jonce in effect from June 30, 1995 to September 9, 1995. Homestead issued four excess policies to Jonce together covering the period June 30, 1994 to June 30, 1998. Gerling alleges that the Homestead policy was excess to primary policies issued by United National, AIG, and American Equity. Great American issued four excess policies

1 to Jonce together covering the period June 30, 1998 to February 6, 2001. Gerling alleges  
2 that the Great American policies were excess to primary policies issued by Newmarket  
3 Underwriting Insurance Company and Lloyds of London.

4 Gerling defended Jonce in both the *Chartwell* and the *Emery Bay* actions. Gerling  
5 requested that defendants contribute to the defense of both actions, but both insurers  
6 refused, maintaining that their policies were excess to Gerling's and therefore were not  
7 triggered until exhaustion of Gerling's policy limit. Gerling paid \$425,000 to settle the  
8 *Chartwell* action and \$302,842 to settle the *Emery Bay* action. Gerling's policy limits were  
9 exhausted upon settlement of the *Emery Bay* action. Defendants each contributed a  
10 portion of their excess policy limits to the *Emery Bay* action because Gerling's limit was  
11 exhausted by its contribution to that settlement. Gerling contends that defendants had a  
12 duty to defend and indemnify Jonce in both the *Chartwell* and *Emery Bay* actions.

13 Defendants have moved to dismiss under Fed. R. Civ. Pro. 12(b)(6), arguing that  
14 they had no duty to defend or indemnify Jonce until Gerling's policy limit was exhausted  
15 because their policies were excess to Gerling's.

## 16 DISCUSSION

### 17 **A. Legal Standard**

18 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims  
19 alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).  
20 Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995).  
21 To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy  
22 only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8. Rule  
23 8(a)(2) requires only that the complaint include a "short and plain statement of the claim  
24 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Specific facts are  
25 unnecessary – the statement need only give the defendant "fair notice of the claim and the  
26 grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (citing Bell  
27 Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007)). All allegations of material fact  
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1 are taken as true. Erickson, 127 S.Ct. at 2200. However, a plaintiff's obligation to provide  
2 the grounds of his entitlement to relief "requires more than labels and conclusions, and a  
3 formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 127 S.Ct.  
4 at 1964-65 (citations and quotations omitted). Rather, the allegations in the complaint  
5 "must be enough to raise a right to relief above the speculative level." Id. at 1965. A  
6 motion to dismiss should be granted if the complaint does not proffer enough facts to state  
7 a claim for relief that is plausible on its face. See id. at 1966-67.

8 Generally, the court may not consider any material beyond the pleadings when  
9 ruling on a 12(b)(6) motion. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), overruled  
10 on other grounds. When evidence outside the pleadings is presented to the court, the  
11 motion is generally treated as one for summary judgment and all parties should be given an  
12 opportunity to present pertinent material under Rule 56. Id. The court may consider a  
13 document "outside" the complaint, however, if the complaint specifically refers to the  
14 document and neither party questions its authenticity. Id. "Such consideration does not  
15 convert the motion to dismiss to a motion for summary judgment." Id. at 454 (internal  
16 quotations and citation omitted).

#### 17 **B. The Defendants' Motions**

18 Although Gerling did not attach any of defendants' policies to its complaint,  
19 defendants have submitted the policies in support of these motions. And although Gerling  
20 purports to question the authenticity of defendants' policies, the court finds such objection  
21 inherently unreasonable and without justification given that Gerling quotes extensively from  
22 those very policies in both its complaint and its opposition brief. See United States v.  
23 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a  
24 complaint, it may be incorporated by reference into a complaint if the plaintiff refers  
25 extensively to the document or the document forms the basis of the plaintiff's claim.").  
26 Thus the court considers defendants' policies in ruling on these motions.

1 The positions advanced by defendants, though not identical, are similar. Generally,  
2 defendants argue that they are entitled to dismissal because their policies were excess to  
3 Gerling's and therefore did not obligate them to defend or indemnify Jonce until Gerling's  
4 policy was exhausted. Great American contends that its duty to defend was not triggered  
5 until, by its policy's express terms, "the Limits of Insurance of any other insurance providing  
6 coverage to the 'Insured' have been exhausted . . . ." Homestead similarly argues that, by  
7 its policy's express terms, it had "no duty to defend any claim or suit that any other insurer  
8 has a duty to defend." Defendants also argue that although the indemnity provisions of  
9 their policies provide that coverage is excess only to scheduled policies, the "other  
10 insurance" provisions of their policies are sufficient to overcome that language and require  
11 exhaustion of all primary policies, scheduled and unscheduled, before any duty to  
12 indemnify is triggered.

13 Gerling responds that defendants' "other insurance" provisions are insufficient to  
14 overcome their promises to indemnify the insured upon exhaustion of the scheduled  
15 insurance. Gerling contends that California courts have previously rejected such  
16 arguments, holding that provisions that take away or limit coverage must be "conspicuous,  
17 plain and clear." Gerling also argues that the defense provisions in defendants' policies are  
18 invalid and void as against public policy. Gerling further argues that because both  
19 Homestead and Great American paid a portion of the settlement in the *Emery Bay* action,  
20 defendants had a duty to pay a proportionate share of the defense costs in that case as  
21 well.

22 Defendants reply that there is a strong presumption under California law that excess  
23 coverage is not triggered until exhaustion of all underlying insurance. Regarding its duty to  
24 indemnify, Great American distinguishes a case relied on by Gerling, Travelers Cas. & Sur.  
25 Co. v. Transcontinental Ins. Co., 122 Cal. App. 4th 949 (2004), on the grounds that  
26 Travelers only addressed the duty to defend, not the duty to indemnify. Defendants also  
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1 argue that they have no duty to contribute to the defense costs in the *Emery Bay* action  
2 because all of Gerling's defense costs were incurred prior to exhaustion of its policy limits.

3 As a threshold matter, Great American argues that Gerling's claim must fail because  
4 California law bars contribution between primary and excess carriers. The court disagrees,  
5 however, given the numerous cases providing reimbursement to primary carriers when  
6 excess carriers wrongfully refuse to contribute to the defense or indemnification of the  
7 insured upon exhaustion of the primary insurance. See, e.g., Aetna Cas. and Sur. Co. v.  
8 Certain Underwriters at Lloyds of London, 56 Cal. App. 3d 791 (1976) (primary carrier had  
9 right to reimbursement for defense costs incurred after limit of primary policy was  
10 exhausted); Travelers Cas. and Sur. Co. v. Transcontinental Ins. Co., 122 Cal. App. 4th  
11 949 (2004) (excess carrier's defense obligation was triggered upon exhaustion of primary  
12 carrier's policy limits).

13 Indeed, the cases upon which Great American relies do not support its position. In  
14 Reliance Nat'l Indemnity Co. v. General Star Indemnity Co., 72 Cal. App. 4th 1063, 1082  
15 (1999), the court simply held that an indemnification agreement between two insureds  
16 could not alter the relationship between the primary and excess insurers; the excess policy  
17 remained excess to the primary policy despite an indemnification agreement requiring the  
18 insured under the excess policy to indemnify the insured under the primary policy. The  
19 court in Reliance National and in Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal.  
20 App. 4th 1279, 1294 n. 4 (1998), also relied on by Great American, did hold that "[a]s a  
21 general rule, there is no contribution between primary and excess carriers of the same  
22 insured absent a specific agreement to the contrary." The court in Fireman's Fund went on  
23 to explain, however, that "[c]ourts in equitable contribution cases have generally heeded  
24 primary/excess provisions in insurance contracts, as long as the rights of the policyholder  
25 are not adversely affected." Id. Read in context, the court simply appears to be making the  
26 unremarkable point that an excess insurer will not be required to contribute to the primary  
27 carrier's defense and indemnity of the insured until the primary limit is exhausted, not that a  
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1 primary carrier may never recover from an excess insurer even where the excess carrier  
2 has wrongfully refused to contribute upon exhaustion of the primary limit.

3 **1. Horizontal Exhaustion**

4 The main issue raised by these motions is whether defendants' policies were excess  
5 to Gerling's and therefore not triggered until exhaustion of Gerling's policy limit. The issue  
6 is controlled by the "horizontal exhaustion" rule, which was thoroughly explained in the  
7 leading case Comty. Redevelopment Agency of the City of Los Angeles v. Aetna Cas. and  
8 Sur. Co., 50 Cal. App. 4th 329 (1996). In Community Redevelopment, a group of  
9 developers were sued for construction defects in at least 27 separate lawsuits. Id. at 336.  
10 The developers were covered by a primary insurance policy issued by State Farm with a  
11 limit of \$1 million. The developers were also covered by another primary insurance policy  
12 issued by United, also with a limit of \$1 million. The developers were also covered by an  
13 excess policy issued by Scottsdale with a limit of \$5 million. The Scottsdale policy was  
14 specifically excess to the State Farm policy. State Farm negotiated a settlement of some of  
15 the claims, to which it contributed the \$1 million limit of its primary policy. United then  
16 demanded that Scottsdale "drop down" and contribute to the defense of the remaining  
17 claims. Scottsdale refused, arguing that it had no duty to drop down until exhaustion of all  
18 primary insurance, including the United policies. Id.

19 The Court of Appeal agreed with Scottsdale, relying on language in Scottsdale's  
20 policy which stated that it was excess to "underlying insurance listed in the Schedule of  
21 Underlying Insurance (Schedule A), *plus the applicable limits of any other underlying*  
22 *insurance collectible by the insured.*" Id. at 335 (emphasis in original). The policy also  
23 provided that Scottsdale would have no duty to defend the insured unless "no other  
24 insurance affording a defense or indemnity against such suit is available to the insured." Id.  
25 Finally, the policy's "other insurance" clause provided that the policy "shall be excess  
26 insurance over any other valid and collectible insurance available to the insured, whether or  
27 not described in the Schedule of Underlying Insurance." Id.

The court held that an excess carrier generally “does not cover a loss, nor does any duty to defend the insured arise, until all of the primary insurance has been exhausted.” Id. at 339. The presumption of horizontal exhaustion may be overcome, however, by policy language “specifically describing and limiting the underlying insurance.” Id. at 340. “If an excess policy states that it is excess over a specifically described policy and will cover a claim when that specific primary policy is exhausted, such language is sufficiently clear to overcome the usual presumption that all primary coverage must be exhausted.” Id. n. 6. The Scottsdale policy did not limit its coverage to the excess over the State Farm policy, but instead expressly extended it to “the applicable limits of any other underlying insurance collectible by the insured.” Id. at 341.

The question whether horizontal exhaustion applies in this case thus requires examination of each defendant’s policies. Although each defendant insured Jonce under multiple policies covering consecutive policy periods, the relevant language is identical in each policy. Because the policies distinguish between the duty to defend and the duty to indemnify, the following discussion addresses each duty separately.

## 2. Duty to Defend

**Great American.** Great American’s duty to defend is described in the Insuring Agreements of its policy as follows:

- A. We will have the right and duty to investigate any “claim” and defend any “suit seeking damages covered by the terms and conditions of this policy when:
  1. the applicable Limits of Insurance of the underlying policies listed in the schedule of Underlying Insurance and the Limits of Insurance of any other insurance providing coverage to the “Insured” have been exhausted by actual payment if “claims” for any “occurrence” to which this policy applies; or
  2. damages are sought for any “occurrence” which is covered by this policy but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other insurance providing coverage to the “Insured.”

Thus, the policy plainly requires exhaustion of scheduled insurance and “any other insurance providing coverage to the ‘Insured’ . . . .” Accordingly, Great American’s duty to



1 defend was not triggered until exhaustion of all underlying primary insurance, including  
2 Gerling's. As in Community Redevelopment, the Great American policy also contains an  
3 "other insurance" clause that reinforces this interpretation of the insuring agreement which  
4 provides: "If other insurance applies to a loss that is also covered by this policy, this policy  
5 will apply excess of the other insurance."

6 Gerling nonetheless argues that Great American had a duty to drop down and  
7 contribute to defense costs upon exhaustion of only the scheduled insurance. The case on  
8 which Gerling relies, however, does not support this argument. In USF Ins. Co. v.  
9 Clarendon America Ins. Co., 452 F. Supp. 2d 972 (C.D. Cal. 2006), the policies of two  
10 primary carriers covering the same insured both contained "other insurance" clauses  
11 making them excess to other insurance. The court held that the clauses were mutually  
12 irreconcilable and therefore against public policy. Id. at 1002. Following California law, the  
13 court held that "[w]here two or more primary insurers' policies contain 'other insurance'  
14 clauses purporting to be excess to each other, the conflicting clauses will be ignored and  
15 the loss prorated among the insurers on the ground the insured would otherwise be  
16 deprived of protection." Id. at 1101 (quoting Fireman's Fund, 65 Cal. App. 4th at 1304).

17 USF plainly does not support the proposition that an "other insurance" clause is void  
18 as against public policy under all circumstances. Even if the "other insurance" section of  
19 Great American's policy were ignored, the insuring agreement makes clear that Great  
20 American's duty to defend is triggered only upon exhaustion of all scheduled and  
21 unscheduled primary insurance. Accordingly, Great American had no duty to drop down  
22 and defend Jonce in the underlying actions until Gerling's policy limit was exhausted.

23 **Homestead.** The "Defense Settlements" section of Homestead's policy provides:

24 We will have no duty to defend any claim or suit that any other  
25 insurer has a duty to defend. If we elect to join in the defense of  
26 such claims or suits, we will pay all expenses we incur. You  
27 shall give us the opportunity to associate with you or the  
28 underlying insurers or both in the defense and control of any  
claims, suits or proceedings which involve or appear likely to  
involve this insurance. You and your Insurers shall cooperate  
with us in the defense of such claim, suit or proceeding.



Based on this language, Homestead plainly agreed to defend Jonce only if no other insurer had a duty to defend. Homestead therefore had no duty to contribute to Gerling's defense of Jonce at least until Gerling's policy limit was exhausted. See Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyds of London, 56 Cal. App. 3d 791, 804 (1976) (primary carrier had no duty to defend after exhaustion of primary policy without a right of reimbursement from excess carriers).

As discussed above, Gerling makes no persuasive arguments as to why the plain language of defendants' defense provisions should not control. In both instances, defendants promised to defend Jonce only upon exhaustion of all scheduled and unscheduled primary insurance. Accordingly, the horizontal exhaustion rule applies to the duty to defend under both the Great American and the Homestead policies.

### 3. Duty to Indemnify

**Great American.** Great American's policy defines its duty to indemnify as follows:

We will pay on behalf of the "Insured" those sums in excess of the "Retained Limit" that the "Insured" becomes legally obligated to pay by reason of liability imposed by law or assumed by the "Insured" under an "insured contract" because of "bodily injury," "property damage," "personal injury," or "advertising injury" that takes place during the Policy Period and is caused by an "occurrence" happening anywhere. The amount we will pay for damages is limited as described below in the Insuring Agreement Section II. LIMITS OF INSURANCE.

The "Limits of Insurance" section includes a sub-section titled "Retained Limit" that provides:

We will be liable only for that portion of damages, subject to the Each Occurrence Limit stated in the Declarations, in excess of the "retained limit," which is the greater of:

1. the total amounts stated as the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other insurance providing coverage to the "Insured" during the Policy Period; or
2. the amount stated in the Declarations as Self-Insured Retention as a result of any one "occurrence" not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by any other insurance providing coverage to the "Insured" during the Policy Period . . .

1 Great American's duty to indemnify is therefore triggered upon exhaustion of  
2 scheduled policies and other insurance providing coverage to Jonce during the Policy  
3 Period. Gerling alleges that its policy period ended three years prior to the first Great  
4 American policy, and therefore did not provide coverage to Jonce during Great American's  
5 policy period. The plain language of Great American's policy therefore supports Gerling's  
6 argument that Great American had a duty to drop down and provide coverage to Jonce  
7 upon exhaustion of the policies listed in the Schedule of Underlying insurance.

8 Great American argues that the "retained limit" language is insufficient to overcome  
9 the presumption of horizontal exhaustion because coverage is subject to the "limits of  
10 insurance" section, which in turn provides that coverage is subject to "the terms and  
11 conditions of this policy." The "Conditions" section of the policy contains an "other  
12 insurance" section (quoted above) that makes Great American's coverage excess to all  
13 other insurance. This exact argument has been rejected by at least two California courts.

14 In Travelers Cas. and Sur. Co. v. Transcontinental Ins. Co., 122 Cal. App. 4th 949,  
15 956 (2004), the excess carrier's duty to defend was triggered upon exhaustion of only  
16 scheduled insurance. The insurer argued, however, that the policy's "other insurance"  
17 provision was a condition precedent to its duty to defend and that horizontal exhaustion  
18 therefore applied. Id. The court rejected this argument, reasoning first that the "other  
19 insurance" provision conditioned the carrier's obligation to "make payments" once coverage  
20 attached, but it did not condition either the existence of coverage or the duty to defend. Id.  
21 at 957. The court also pointed out that the location of the "other insurance" section within  
22 the "Conditions" section, which set forth "rights, obligations and interpretive aids 'applicable  
23 to' coverage under the policy" further suggested that the "other insurance" provision was  
24 not a condition to the existence of coverage. Id. Finally, the court held that the carrier's  
25 interpretation was "contrary to the rule that insurance provisions that take away or limit  
26 coverage must be conspicuous, plain and clear." Id. at 958. Rather than place the  
27 exclusionary language in the "Insuring Agreements," "Defense and Supplementary  
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1 Payments,” or “Exclusions” sections, the carrier had placed its “other insurance” clause  
2 “among boilerplate provisions such as those requiring written endorsement to change the  
3 terms of the policy and providing that the stated premium ‘is a flat premium.’” This was  
4 insufficient to overcome the plain language of the insuring agreement: “If Federal intended  
5 to have coverage be dependent upon the exhaustion of ‘other insurance,’ it was required to  
6 make such an exclusionary clause conspicuous, plain, and clear.” *Id.* The court  
7 distinguished Community Redevelopment, holding that the language of the insuring  
8 agreement was “sufficiently clear to overcome the usual presumption that all primary  
9 coverage must be exhausted.” (quoting Community Redevelopment, 50 Cal. App. 4th at  
10 340 n.6).

11 The Court of Appeal reached a similar conclusion in Carmel Development Co. v. RLI  
12 Ins. Co., 126 Cal. App. 4th 502 (2005). There, a policy was excess to a specific primary  
13 policy, but the excess carrier argued that its “other insurance” clause made its coverage  
14 excess to all other insurance. *Id.* at 511. The court rejected this argument, reasoning that  
15 the excess carrier “did not clearly and unequivocally inform the insured that it was excess  
16 over all other insurance, primary and excess, but buried its limitation on the second to the  
17 last page in a generally worded ‘other insurance’ clause, a condition generally accorded  
18 judicial disfavor.” *Id.*

19 These cases suggest that where a carrier promises in the insuring agreements to  
20 make its coverage excess to a specific policy or policies, an “other insurance” clause  
21 contained within the policy’s “conditions” section does not defeat the applicability of the  
22 general presumption. Although the court in Community Redevelopment considered the  
23 policy’s “other insurance” clause, it viewed the clause as reinforcing the language of the  
24 insuring agreement, which itself expressly made coverage excess to all underlying  
25 insurance. Great American expressly agreed to provide coverage in excess of the retained  
26 limit, which is defined as the limits of insurance listed on the Schedule of Underlying  
27 Insurance and any other policy providing coverage during the policy period. Great  
28

American's argument that its "other insurance" clause overcomes this promise is unpersuasive.

Homestead. Coverage A of Homestead's policy provides:

We will pay those sums that the Insured must legally pay as damages because of bodily injury, property damage, personal injury, or advertising injury, caused by an occurrence which occurs during the policy period of this policy in excess of the sums payable as damages in the underlying insurance or would have been payable but for the exhaustion of the applicable limit of insurance

"Underlying insurance" is defined as the insurance policies listed in Schedule A—Schedule of Underlying Insurance Policies, including any renewals or replacements thereof which provide the underlying coverages and limits stated in Schedule A—Schedule of Underlying Insurance Policies."

The plain language of Homestead's policy therefore makes its indemnity coverage excess only to the specific policies listed in the Schedule of Underlying Insurance Policies. Homestead nonetheless argues that the horizontal exhaustion rule applies, relying on Community Redevelopment for its argument that "[i]t is not enough to defeat the presumption that all primary coverage must be exhausted simply to point to a provision that the subject excess policy is excess over a specifically described policy." Homestead argues that Community Redevelopment applied the horizontal exhaustion rule even though the excess carrier's coverage was excess to a specific policy.

Homestead's argument mischaracterizes the facts in Community Redevelopment. The policy there was excess to a specific policy—the Scottsdale policy—but, as noted by the court, it was not exclusively excess to that policy. 50 Cal. App. 4th at 334. Instead, coverage was excess to both the limits of the Scottsdale policy and "the applicable limits of any other underlying insurance collectible by the insured." Id. at 335. No such language appears in Homestead's policy.

Like Great American's, Homestead's policy contains an "other insurance" paragraph in the "Conditions" section that provides:

1 The insurance afforded by this policy shall be excess insurance over all  
2 underlying insurance covering a loss covered by this policy whether or not  
3 valid and collectible. It shall also be excess insurance over all other valid  
4 and collectible insurance not described in the Schedule A—Schedule of  
5 Underlying Insurance Policies (except other insurance purchased  
6 specifically to apply in excess of this insurance) which is available to the  
7 Insured, covering a loss also covered by this policy.

8 For the same reasons discussed above with respect to Great American's "other  
9 conditions" provision, the court finds this provision does not require application of the  
10 horizontal exhaustion rule. Homestead's insuring agreement plainly made coverage  
11 excess to the specific policies listed in the schedule of insurance. The "other insurance"  
12 condition is not sufficient to overcome this agreement.

#### 13 **4. Remaining Issues**

14 There are several issues that the court does not reach at this time. First, while the  
15 court has determined that the motions to dismiss insofar as they are based on each  
16 defendant's duty to defend must be granted, given the clear language of the policies, it is  
17 not clear to the court whether the court's finding that Gerling has stated a claim with respect  
18 to defendants' duty to indemnify, precludes dismissal of the complaint in its entirety.  
19 Counsel for defendants both emphasized at the hearing the well established rule,  
20 enunciated in Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal.4th 945  
21 (2001), that where there is a duty to defend, there may be a duty to indemnify; but where  
22 there is no duty to defend, there cannot be a duty to indemnify. Both suggested but did not  
23 specifically state that even if the policies provided a duty to indemnify under these  
24 circumstances, there could be no liability given the absence of a duty to defend. They also  
25 pointed out that plaintiff cited no authority in which an excess policy insurer was found to  
26 have a duty to drop down and indemnify when there was no duty to defend. The court has  
27 reviewed the parties' briefs again and has confirmed that plaintiff provided no authority that  
28 the well established principle does not apply to an excess as well as a primary insurer.  
However, defendants' briefs similarly did not squarely address this issue and the court is  
reluctant to make any findings on the record before it. Moreover, the defendants have not

1 explained why, if there was no duty to indemnify because there was no duty to defend, they  
2 contributed to the settlement of the *Emery Bay* action following exhaustion of Gerling's  
3 policy limits. Nor have they explained how the court should factor the contributions into the  
4 findings they are urging upon the court.

5 Second, Homestead argues that even if it had a duty to "drop down" to the primary  
6 layer and provide coverage to Jonce prior to exhaustion of Gerling's policy, that coverage  
7 was still excess to Gerling's policy limits under Homestead's "other insurance" provision.  
8 Homestead cites no authority in support of this position and the court finds this issue not  
9 appropriate for resolution on a motion to dismiss because the effect of Homestead's "other  
10 insurance" provision at the primary layer cannot be evaluated without reference to Gerling's  
11 policy, which is not before the court.

12 Third, Gerling argues that because defendants paid a portion of the settlement in the  
13 *Emery Bay* action, defendants had a duty to pay a proportionate share of the defense costs  
14 as well. It appears to the court, however, that a determination of this issue depends to  
15 some extent on whether the primary insurer's defense costs were incurred prior to the  
16 settlement of litigation and prior to exhaustion of the primary policy limits. See e.g. Aetna,  
17 56 Cal. App. 3d at 804; Signal Companies v. Harbor Ins. Co., 27 Cal. 3d 359 (1980). As  
18 this kind of evidence is outside of the four corners of the complaint or defendants' policies,  
19 it is not appropriate for consideration on this motion. Moreover, the court is unclear on  
20 whether its finding of no duty to defend actually obviates the need for resolution of this  
21 issue.

## 22 CONCLUSION

23 Neither defendant had a duty to defend under the clear language of their excess  
24 policies. Thus their motions to dismiss plaintiff's claims for declaratory relief and  
25 contribution, to the extent those claims are based on the duty to defend, are GRANTED,  
26 with prejudice. To the extent the claims are based on the duty of defendants to indemnify,  
27 the motions are DENIED. The parties shall set forth the status of any remaining claims in  
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1 their case management statement and be prepared to discuss scheduling of any future  
2 proceedings at the case management conference scheduled for August 7, 2008.

3 **IT IS SO ORDERED.**

4 Dated: July 11, 2008



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PHYLLIS J. HAMILTON  
United States District Judge